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Supreme Court of the United States

OCTOBER TERM, 1957.

No. 566

JULIUS E. ROSENGARD ET AL.
AND
COURT STREET PARKING CO.,
APPELLANTS,

v.

CITY OF BOSTON ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered on June 26, 1957, ordering that a decree be entered in each case dismissing the bill of complaint, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Superior Court of the Commonwealth of Massachusetts, for the County of Suffolk, is unreported. The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, is reported in Massachusetts Advance Sheets (1957) at page 873. A copy of the opinion and judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts is attached hereto as Appendix A.

Jurisdiction

This suit is one to enjoin the enforcement of a Massachusetts statute as repugnant to Section One, Amendment Fourteen of the Federal Constitution. The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on June 26, 1957. Final decree after rescript, was entered in the Superior Court of the Commonwealth of Massachusetts, County of Suffolk on August 8, 1957. Notice of appeal was filed in the Superior Court of the Commonwealth of Massachusetts, County of Suffolk on August 23, 1957, (R. 50). The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment on appeal in this case:

Kedroff v. *St. Nicholas Cathedral of Russian Orthodox Church in No. America* 344 U.S. 94;

Local 333B, United Marine Division of International Longshoremen's Association (A. F. L.) v. *Battle* 342 U.S. 880

Winters v. *People of State of New York* 333 U.S. 507

Statutes Involved

It is alleged that Chapter 474 of the Acts of 1946, as amended, of the Laws of the Commonwealth of Massachusetts is invalid. The text of this Act, together with its pertinent amendment, Chapter 612, of the Acts of 1948, is attached hereto as Appendix B.

Questions Presented

The following questions are presented by the appeal:

(1) Is Chapter 474 of the Acts of 1946, as amended, of the laws of the Commonwealth of Massachusetts, repugnant to Section One of the Fourteenth Amendment of the Constitution of the United States in that it permits:

(a) The taking by the City of Boston, by eminent domain, of privately owned property, which, at the time of the taking is being operated as a puplic parking lot, and leasing the same as a puplic parking lot, without any change being made, or required to be made under the terms of the lease, to private interests, for private profit, for a term not exceeding three (3) years?

(b) The taking by the City of Boston, by eminent domain, of privately owned property, which is at the time of the taking, being operated as a puplic parking lot, and leasing the same as a puplic parking lot, for a period not exceeding forty (40) years, to private interest, for private profit, upon the express condition that the lessee shall construct structures, at no expense to the lessor, which will at least double the number of vehicles that may be accommodated?

(c) The taking by the City of Boston, by eminent domain, of privately owned property, which, at the time of the taking, is being operated as a public parking lot, and constructing structures, at the City's expense, which will at least double the number of vehicles that may be accommodated; and subsequent to such constructions lease the condemned property as a public parking lot, for a period not exceeding forty (40) years, to private interests, for private profit?

(d) The taking by the City of Boston, by eminent domain, of privately owned property, which, at the time of the taking, is being operated as a public parking lot, and while attempting to lease the property as a public parking lot to a lessee who will construct structures at his own expense, which will at least double the number of vehicles that may be accommodated, lease the condemned property, in the same condition in which it was taken, to private interest, for private profit, for a term not exceeding three (3) years?

Statement of the Case

These are two companion proceedings in equity. The respective appellants are the owners of certain parking lots in the City of Boston. The appellees in each case are the City of Boston, its Mayor, and its Real Estate Board, (R. 1-3; 16-18).

Both appellants have been operating their parcels as public parking lots and they have all the required licenses to do so. They intend to continue their present operations and they have under preparation plans to increase the capacity of each lot by the erection of structures thereon, (R. 11; 25).

The appellees, acting pursuant to the purported authority granted by Chapter 474 of the Acts of 1946, as amended, of the Laws of the Commonwealth of Massachusetts, instituted condemnation proceedings for the taking of appellants' parking lots. If successful in these takings, the appellees are to lease the lots back to private interests, for private profit, to be used as public parking lots. Under the terms of each lease, the lessee may or may not be required to construct structures which will increase the number of vehicles that can be accommodated, (R. 11-12; 25-26).

Subsequent to the commencement of condemnation proceedings by the appellees, the appellants brought suits in the Superior Court of Massachusetts, for the County of Suffolk, and in their bills of complaint prayed that the appellees be enjoined permanently from taking the appellants' respective parking lots, (R. 4-5; 19-20). The bills of complaint alleged, inter alia, that the Massachusetts statute pursuant to which the appellees were acting, was repugnant to the Constitution and void, (R. 4; 19).

Interlocutory decrees, before answers, were entered enjoining the appellees from taking the appellants' parking lots, (R. 7; 22).

The appellees filed answers which did not contain counterclaims or pray for any kind of affirmative or declaratory relief, (R. 8-10; 22-24).

The parties filed a case stated and in each case embodied most of the factual allegations of the complaints, (R. 10-12; 24-26).

The trial judge then filed his Ruling and Order for Decree, (R. 13; 27). Thereafter, the Superior Court entered final decrees declaring:

> A. That Chapter 474 of the Acts of 1946, as amended, of the laws of the Commonwealth of Massachusetts is constitutional, and

B. That the City of Boston is authorized to take plaintiffs' property "for the purposes therein set forth", (R. 14; 28). On the same date the court entered another decree in each case continuing the preliminary injunction until disposition of an appeal to the Supreme Judicial Court of the Commonwealth of Massachusetts, (R. 13; 27).

The appellants then filed separate motions to have their appeals remanded to the Superior Court of the Commonwealth of Massachusetts, for the County of Suffolk, for the entry of final decrees. These motions were heard by the Full Court and were denied. The Supreme Judicial Court for the Commonwealth of Massachusetts then notified the Attorney General of the Commonwealth of Massachusetts of the pendency of these cases and gave him leave to file a brief and to argue.

The appellants, in their brief and argument before the Supreme Judicial Court of Massachusetts, alleged that Chapter 474 of the Acts of 1946, as amended, of the Laws of the Commonwealth of Massachusetts violates the Constitution of the United States. Under the section of the brief entitled *Questions Presented*, question number III reads: "Does Chapter 474 of the Acts of 1946, as amended, violate the Fifth or Fourteenth Amendment of the Constitution of the United States of America?"

After argument, the Supreme Judicial Court of the Commonwealth of Massachusetts reversed the decrees of the lower court and ordered a decree to be entered in each case dismissing the bills of complaint, (R. 30, 32).

In its opinion, the Supreme Judicial Court of the Commonwealth of Massachusetts expressly stated that "the statute is constitutional", (R. 36) and that they "have considered all the points argued by the plaintiffs", (R. 40).

The Questions Are Substantial

I. A basic rule of law governing the taking of private property by eminent domain is that this inherent right of the sovereign cannot be exercised validly for the purpose of taking private property for private purposes. The Supreme Court of the United States has repeatedly adhered to this principle in its numerous decisions concerning the subject.

(For example, see *Wilkinson* v. *Leland* 27 U.S. (2 Pet) 627, 657; *West River Bridge Company* v. *Dix* 47 U. S. (6 How) 507, 537; *Cole* v. *LaGrange* 113 U. S. 1, 6)

It is precisely this basic and fundamental principle of law which the Massachusetts legislature has violated in Chapter 474 of the Acts of 1946, as amended.

By the provisions of this statute the City of Boston has the power to take, by eminent domain, private property which is being operated by private citizens as a public parking lot, and lease this same property to private interests for private profit without changing or modifying the property in any manner. Although the lease in such a situation cannot be for more than three years, there is nothing within the terms of the statute to prevent renewal ad infinitum. Thus, under the guise of a lease, the City is in effect exercising its sovereign power at the expense of private citizens for the financial benefit of other private interests. This very procedure was condemned by the Court in the early decision of *Mills* v. *St. Clair County*, 49 U. S. (8 How) 569, 585, where it was expressly stated that the taking of private property not for public use, but to be leased out to private occupants for the purpose of raising money, is an abuse of the power of eminent domain.

See also *Kohl* v. *U. S.*, 91 U. S. 367, 373-374; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 161; *Pine Grove Township* v. *Talcott*, 86 U. S. 666

The further sections of the Massachusetts statute provide for the construction of additional parking facilities on the condemned property, by either the lessor or the lessee, which will increase the number of vehicles that may be accommodated. In the case at bar, the appellants, as owners of public parking lots, are willing to construct such facilities at their own expense in order to retain the ownership and operation of their property. This, however, does not prevent condemnation proceedings within the meaning of the statute.

It is argued by the appellees that there is no assurance that the appellants will continue to operate their property as a public parking lot. In fact, they may convey the property to third partes. This argument was sustained by the Supreme Judicial Court of the Commonwealth of Massachusetts. Such a contention, based on pure conjecture, is untenable. If the appellants cease to operate the property as a public parking lot, or if they attempt to convey the property to third parties, the City of Boston may then protect its interests by exercising its power of eminent domain.

It is further contended by the appellees that since it is the lessor of the condemned property it can regulate the operation of the premises in such a manner as to control the schedule of prices to be charged for parking and the hours during the day and evening when the parking lot will be in operation. This reasoning assumes an initial valid taking for a public purpose which is non-existant. This type of rationale, if applied under such circumstances is not only dangerous but could prove disastrous if extended. The fact that a sovereign would be able, through private interests, to operate a business in such a manner as to lessen the expense to the ultimate consumer or user and to increase the hours of operation, cannot justify the exercising of its power of eminent domain. Such a course of action, is not only repugnant to the principles of fair

competition, but is violative of the rights granted by the Constitution of the United States. This was voiced by Mr. Justice Gray in *Missouri Pacific Railway Company v. Nebraska*, 164 U. S. 403, 417, in stating that "the taking by a state of the private property of one person or corporation without the owner's consent, for the private use of another, is not due process of law, and is in a violation of the 14th Article of Amendment of the Constitution of the United States . . ."

II. If the General Court may constitutionally accomplish what it has attempted in Acts of 1946 Chapter 474, as amended, a dangerous extension will have been made in the public power to take property by eminent domain. It will be possible for the legislature, acting in good faith, to enable the municipalities of Massachusetts to become middlemen in a variety of enterprises. For example, let us assume that the legislature someday decides that there is a public need for more hotel rooms or for more apartment houses in the city of Boston. It may authorize the city to take a hotel or a downtown apartment house and to lease them to other individuals who will operate them in the same manner as before the taking. Thus, the municipality would reap a profit for its general funds by the simple expedient of transferring control from one private owner to another. This action would not add a single bed to accommodate a visitor, nor a single apartment to accommodate a family. Yet the taking might be supported on the theory that the hotel or the apartment house could be torn down or converted by the private owners if the municipality was not given the power to take by eminent domain. It seems that the obvious answer to this reasoning is that the municipality can be given the power to take *if and when* the owner takes steps to raze or to convert the properties in question.

III. The appellants contend that the Supreme Judicial Court of the Commonwealth of Massachusetts was in error when it held that the "aspects of private advantage as the statutory plan presents are reasonably incidental to carrying out a public purpose in a way which is within the discretion of the Legislature to choose". (R. 40).

The parking lots now in question are public lots. They are entirely devoted to public uses. It is true, that they could be expanded by the construction of structures on the property but the Massachusetts statute, as stated above, does not require such construction as a prerequisite to leasing the premises. Under such circumstances, the exercise of the power of eminent domain cannot be justified.

The Court also held that "it was permissible for the Legislature to determine that it is in the public interest to enlist private capital so far as feasible for the construction and operation of the facilities." (R. 39). Under the present set of circumstances it is submitted that this statement is error. The appellants have stipulated and still agree that they will construct additional parking facilities on their premises. Why, then, is it necessary to "enlist private capital" for such enlargement?

The appellants contend that the statutory plan, as presented by Chapter 474 of the Acts of 1946, as amended, is not for a public purpose. On the contrary, it is for private interests and therefore is repugnant to Section One of the Fourteenth Amendment of the Constitution of the United States.

For these reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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Appendix A

OPINION OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

COURT STREET PARKING CO. *vs.* CITY OF BOSTON & others (and two companion cases [1]).

Suffolk. May 7, 1957.—June 26, 1957.

Present: WILKINS, C.J., RONAN, WILLIAMS, WHITTEMORE, & CUTTER, JJ.

WHITTEMORE, J. These are three suits in equity brought by owners and operators of parking lots for automobiles in the city of Boston. The defendants in each case are the city of Boston, its mayor and its real property board. The bills of complaint seek to enjoin action under St. 1946, c. 474, as amended by St. 1948, c. 612, to take the parking lots of the plaintiffs for the purpose of constructing thereon public parking facilities. There is also in each bill a prayer that the court "determine that any taking by the city of Boston of the land owned and operated by the plaintiff for public parking purposes is contrary to law." The cases were heard together as cases stated, the contents of which were similar in form and substance. The final decree in each case adjudged "that chapter 474 of the Acts of 1946 is constitutional and that the city of Boston is authorized to take the plaintiff's property for the purposes therein set forth."

After the appeals from the final decrees were entered in this court the plaintiffs moved that the causes be remanded to the Superior Court for the entry there in each case of a "final decree," contending that the decrees entered do not

[1] The companion cases are by Julius E. Rosengard and another, and by Pilgrim Parking, Inc., against the same defendants.

finally dispose of the cases. These motions were denied and by order of this court notice was sent to the Attorney General of the pendency of the cases here, pursuant to which he filed a brief and an assistant attorney general argued before us.

1. The decrees entered were final decrees from which appeals could be taken to this court.

These cases as they were tried were not in such an aspect as to permit the entry of declaratory decrees under G. L. (Ter. Ed.) c. 231A, inserted by St. 1945, c. 582, § 1. We need not decide whether in an appropriate case the prayer for determination that "any taking . . . is contrary to law" would be sufficient without amendment to support a declaration under c. 231.[1] Section 8 of c. 231A provides: "If a question of constitutionality is involved in any proceeding under this chapter, the attorney general shall also be notified of the proceeding and be entitled to be heard." Such notice and opportunity are conditions precedent to the entry of a declaratory decree. See *Lowell* v. *Boston*, 322 Mass. 709, 740-741; *City Manager of Medford* v. *Civil Service Commission*, 329 Mass. 323, 330; Anderson, Actions for Declaratory Judgments (2d ed.) § 361. But the lack of power to enter such a decree of course does not impair the general equitable jurisdiction of the Superior Court which was invoked by the bills of complaint to prevent irreparable injury by enjoining invalid action. Compare *Hull* v. *Belmont*, 309 Mass. 274.

The absence of power to enter these declaratory decrees did not make them other than final decrees from which

[1] Section 6 provides: "In an action at law or suit in equity heretofore or hereafter brought to obtain a judgment or other consequential relief, whether such judgment or relief is granted or not, the court may make a binding determination as provided in this chapter upon application of any party made in his declaration, bill, petition or answer."

appeals could be taken. The court below held by necessary implication that the bills of complaint presented cases for declaratory relief. If that construction had been correct the decrees would finally have disposed of the cases. It is settled that any question of the jurisdiction underlying a final decree or judgment will be determined by an appellate court whenever the case is brought before it by any possible means. *Donnelly* v. *Montague*, 305 Mass. 14, 19. *Crystal, petitioner*, 330 Mass. 583,591.

2. The statute is constitutional; no unlawful action is forecast and the plaintiffs are not entitled to injunctive relief.

Statute 1946, c. 474, provides in part as follows: The city of Boston acting by the board of real estate commissioners "shall forthwith proceed with the establishment of such public off-street parking facilities in the city as the board may deem necessary to insure in the public interest the free circulation of traffic in and through the city." The board is given the power to acquire by purchase, gift, devise, eminent domain, or otherwise, but not by lease, real and personal property and interests therein other than leasehold "in such locations . . . as the board, with the approval of the planning board and the traffic commission of the city, shall have determined require public off-street parking facilities; provided that the board shall have no power to acquire, except by gift or devise, any property privately held and operated as a garage, which term shall not be construed to include a parking space."

Statute 1948, c. 612, supplemented the earlier act in part as follows: It declared that congestion from parking of motor vehicles is a public nuisance, which the establishment of off-street parking facilities would not adequately abate, that for this purpose the building of structures to

increase the number of vehicles to be accommodated was necessary, and "that it is not in the public interest to expend public funds in the building of structures on public off-street parking facilities when private capital is available therefor"; and accordingly, as a "public necessity," it added to the powers given to the board by St. 1946, c. 474, the power to lease to any person any property acquired for the purposes of the act "to be used by the lessee for the parking of motor vehicles but for no other purpose" for up to forty years, "and upon such terms as the board shall determine," provided that "any lease for a period exceeding three years shall be upon the express condition, and shall contain a covenant on the part of the lessee, that within such period, not exceeding three years, after its execution as the board shall fix the lessee shall construct . . . without cost to the city such structures and facilities for parking as the board shall determine, which shall at least double the number of motor vehicles the demised premises can accommodate." The annual rent under leases for over three years is to be in such amount "as the board shall determine to be reasonable but in no event less than four per cent of the total cost to the city . . . of the demised premises including any improvement thereof made prior to the execution of the lease." "No lease shall be made except to the highest responsible bidder as determined by the board." "[E]very lease shall contain schedules of maximum rates to be charged by the lessee for the use by the public of the property thereby demised, and also regulation with respect to the use, operation and occupancy of such property." "No person shall be assessed any tax upon any real estate or buildings of which he is the lessee under this act, any provision of general or special law to the contrary notwithstanding."

The cases stated include these facts: The owner or operator of each lot "has under preparation plans to con-

struct a structure thereon so that the capacity for motor vehicles will be "greatly increased. The board has held hearings concerning the taking of the land and "intends at an early date to take by eminent domain the fee. . . . The defendants intend, after these takings, to lease the land so acquired to a private person or persons upon condition that the lessee construct upon the land" a facility greatly to increase the accommodations—that is, in two instances from forty-five and ninety automobiles, respectively, to seven hundred automobiles and in the third instance from ninety automobiles to "greatly increased" capacity. "The defendants intend to act strictly in accordance with the provisions of the statutes . . . ." The prospective lessee, subject to the statute, will operate the facilities "for the lessee's personal profit." The defendants intend until the execution of a lease under which a building will be constructed to lease the lots to private operators "who will operate the same, without substantial change from . . . present condition[s], as a public parking lot for their own personal profit" subject to the statutes. If for any reason the defendants do not conclude a lease conditioned on construction, they intend "to continue to lease the said land to private persons . . . or to construct the structure [or facility] with municipal funds and to lease the same to private persons for operation" all under the statutes.

Legislative findings such as are embodied in these statutes are significant. *Allydonn Realty Corp.* v. *Holyoke Housing Authority*, 304 Mass. 288, 293-294. *McLean* v. *Boston*, 327 Mass. 118, 121. *Opinion of the Justices*, 320 Mass. 773, 779-780. We have already decided in effect that the purpose declared in St. 1946, c. 474, § 1, is a public purpose, that is, in the words of the statute, "the establishment of . . . off-street parking facilities . . . to insure in the public interest the free circulation of traffic in and

through the city." *Tate* v. *Malden*, 334 Mass. 507, 508.[1] The public interest is emphasized where the need for relief is so great that the existing condition can be termed a nuisance as has been done in St. 1948, c. 612. *Lowell* v. *Boston*, 322 Mass. 709, 737. *Cabot* v. *Assessors of Boston*, 335 Mass. ——, ——.[2]

We have already determined also that the fact that private operators may be expected to profit from the operation of the buildings does not, in such general schemes as this to meet such a need as is here shown, mean that the statutory plan is not for a public purpose. *Lowell* v. *Boston*, 322 Mass. 709, 735-738. *Cabot* v. *Assessors of Boston*, 335 Mass. ——, ——.[3] See *Allydonn Realty Corp.* v. *Holyoke Housing Authority*, 304 Mass. 288, 294-295; *Opinion of the Justices*, 330 Mass. 713; *Papadinis* v. *Somerville*, 331 Mass. 627.

The tax exemption provision is valid. *Cabot* v. *Assessors of Boston*, 335 Mass. ——, ——.[1]

It was permissible for the Legislature to determine that it is in the public interest to enlist private capital so far as feasible for the construction and operation of the facilities. *Lowell* v. *Boston*, 322 Mass. 709, 736. *Cabot* v. *Assessors of Boston*, 335 Mass. ——.[2]

The important question now raised is whether the possibility that in some instances it may turn out that for an indefinite period the only apparent change so far as parking facilities are concerned will be from a private owner to a private operator who leases from the city, accomplished under the power of eminent domain, makes the stat-

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[1] Mass. Adv. Sh. (1956) 1025, 1026.

[2] Mass. Adv. Sh. (1956) 1299, 1309. Appeal dismissed June 10, 1957, sub nomine Cabot v. Alphen, —— U.S. —— (25 U. S. L. W. 3365).

[3] Mass. Adv. Sh. (1956) 1299, 1304.

[1] Mass. Adv. Sh. (1956) 1299, 1309-1310.

[2] Mass. Adv. Sh. (1956) 1299.

utes invalid because primarily, or too much, in private interest. But that is not all that will have been accomplished even if such case or cases arise. Public purposes will have been served. The land taken will stand permanently devoted to the public purpose of an adjunct to, and facilitating, the use of public ways and not subject in such use to the decision of an owner to change the use. *Tate* v. *Malden*, 334 Mass. 507.[3] It will so stand as a part of a statutory plan to provide enough such areas to relieve a pressing public need. Its ownership will have changed as a part of a plan designed to use public authority to marshal private capital to meet the public need. The possibility upon which the plaintiffs rely is not the primary purpose of the statutes. The existence of the possibility does not make the intent of the statutes or their effect in operation the use of public authority to serve a private end. There is reasonable provision for control in the public interest if such a possibility develops as a fact. It is "every lease" that must contain "schedules of maximum rates . . . and also regulations with respect to the use, operation and occupancy . . . ."

The statutes are to be judged as enactments designed to increase the amount of space in the city of Boston available for the parking of automobiles by facilitating the construction of buildings for the purpose in areas of parking congestion. It cannot be known in advance when private capital for this purpose will surely be available. It is reasonable to provide for the continued use of the land for parking purposes pending construction, either by private operators or by the city. The possibility that some lot or lots will continue indefinitely without the construction of a building thereon could have been provided against either by requiring that the city itself build after a period

[3] Mass. Adv. Sh. (1956) 1025.

of attempted leasing or, as the plaintiffs have suggested, by authorizing a taking only after a lease to construct had been secured. But it is not necessary so to limit and hamper the city in its acquisition and development of property for a public purpose.

We hold that such aspects of private advantage as the statutory plan presents are reasonably incidental to carrying out a public purpose in a way which is within the discretion of the Legislature to choose. See discussion of public and private objects in *Allydonn Realty Corp.* v. *Holyoke Housing Authority*, 304 Mass. 288, 292. Compare *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 377; *Opinion of the Justice*, 332 Mass. 769, 782.

We do not think, and the plaintiffs have not contended, that an arbitrary and unreasonable distinction is made by the statutes in excluding existing garages from the category of property which can be taken or purchased. Existing garages presumably already provide substantially more space for parking automobiles than would be afforded by the use of the underlying land without a structure thereon, and hence already serve the purpose of the statutes. The fact that owners of particular parking lots may have plans for building garages, which so far as appears may have developed or matured after the board began action for taking their lots, does not make the statutes arbitrary in their application. The validity of action under a general plan for serving a public need cannot depend on such uncertainties.

We have considered all the points argued by the plaintiffs. It is not important, we think, that the maximum rates will be established in advance by the board; presumably, subject to the maximum limitation, rates will be so fixed by the operators as to cause the use of the facilities and produce income. Nor is it an argument against validity that certain receipts are to be paid into the Parking Fa-

cilities Fund and that other receipts are to be credited to general funds of the city.

The agreement in each "case stated" that "The defendants intend to act strictly in accordance with the provisions of the statutes" disposes of any suggestion that upon a determination of validity of the statutes or the denial of injunctions any other course might be pursued.

3. The bills asked injunctions against action under allegedly invalid statutes. That issue being found against the plaintiffs it is proper that the bills be dismissed. Upon an appeal under G. L. (Ter. Ed.) c. 214, § 19, "the cause shall thereupon be pending before the full court, which shall hear and determine the same, and affirm, reverse or modify the decree appealed from. . . ." We need not determine whether the necessity under G. L. (Ter. Ed.) c. 231A, § 8, of notice to the Attorney General and an opportunity for him to be heard before declaratory relief may be given, has been met in these cases by the notice given to him after the cases reached this court, so that under our broad powers we could now enter a declaratory decree. The same end of a determination of the validity of the statutes is now served, after this opinion, by the dismissal of the bills of complaint on the merits. See *Lowell* v. *Boston*, 322 Mass. 709, 740-741.

The decrees are reversed. A decree is to be entered in each case dismissing the bill of complaint.

So ordered.

Samuel P. Sears, (*Lawrence R. Cohen* & *Julius E. Rosengard* with him,) for the plaintiffs.

William D. Quigley, Assistant Corporation Counsel, for the city of Boston and another.

Hugh Morton, Assistant Attorney General, for the Attorney General.

Appendix B

CHAPTER 474 OF THE ACTS OF 1946 OF THE COMMONWEALTH OF MASSACHUSETTS

ACTS, 1946—CHAPTER 474

AN ACT TO AUTHORIZE PUBLIC OFF-STREET PARKING FACILITIES IN THE CITY OF BOSTON.

Be it enacted, etc., as follows:

SECTION 1. The city of Boston, hereinafter called the city, acting by the board of real estate commissioners of the city, hereinafter called the board, shall forthwith proceed with the establishment of such public off-street parking facilities in the city as the board may deem necessary to insure in the public interest the free circulation of traffic in and through the city. The board shall have, and, subject to the approval of the mayor, shall exercise in the name and on behalf of the city, all powers necessary and convenient to the accomplishment of the purposes of this act, except the power to operate any parking facility established or acquired under this act. Such powers shall include:—

(*a*) The power to acquire by eminent domain under chapter seventy-nine or chapter eighty A of the General Laws or by purchase, gift, devise or otherwise, but not by lease, and to hold, property, real or personal, or any interest therein except a leasehold estate, in such locations in the city as the board, with the approval of the planning board and the traffic commission of the city, shall have determined require public off-street parking facilities; provided, that the board shall have no power to acquire, except by gift or devise, any property privately held and operated as a garage, which term shall not be construed to include a parking space; and provided, further, that no purchase and

no award, settlement or agreement for judgment in eminent domain proceedings hereunder shall be made by the city or in its behalf, unless the terms of the proposed purchase, award, settlement or agreement, together with all pertinent facts, shall first have been submitted to the Boston Finance Commission not less than ten days before such purchase, award, settlement or agreement;

(*b*) The power to use for the purposes of this act any property now or hereafter within the custody, management and control of the board by virtue of chapter four hundred and thirty-four of the acts of nineteen hundred and forty-three which the board, with the approval of the planning board and the traffic commission of the city, shall have determined should be devoted to the purposes of this act;

(*c*) The power to clear, grade, surface and resurface any property acquired or used for the purposes of this act, and to construct and maintain thereon such structures and facilities for parking as the board shall determine;

(*d*) The power to cut curbs and to issue all permits necessary to the conduct of a parking facility on any property acquired or used for the purposes of this act;

* * * (original (*e*) stricken)

(*f*) The power to sell at public auction, to the highest bidder, any property, real or personal, acquired or used for the purposes of this act, whether or not improved, which the board, with the approval of the planning board and the traffic commission, shall have determined to be no longer required for such purposes. Any amounts received from sales under this paragraph shall be credited to the Parking Facilities Fund established in section four.

SECTION 2. * * * (First sentence stricken)

No contract for construction or work of any kind in connection with any parking facility, the estimated cost of which amounts to one thousand dollars or more, shall be

awarded by the board under this act unless proposals for the same shall have been invited by advertisements in at least one daily newspaper published in the city, once a week for at least two consecutive weeks, the last publication to be at least seven days before the time specified for the opening of said proposals, and then only to the lowest responsible bidder as determined by the board. Such advertisements shall state the time and place where plans and specifications of proposed construction or work may be had and the time and place for opening the proposals in answer to said advertisements, and shall reserve to the board the right to reject all proposals. All such proposals shall be opened in public. No bill or contract shall be split or divided for the purpose of evading any provision of this section. All contracts made by the board hereunder where the amount involved is one thousand dollars or more shall be in writing. Any contract made as aforesaid may be required to be accompanied by a bond with sureties satisfactory to the board, or by a deposit of money, certified check or other security for the faithful performance thereof, and such bonds or other securities shall be deposited with the city treasurer until the contract has been carried out in all respects; and no such contract shall be altered except by written agreement of the contractor, the sureties on his bond and the board. Any amounts received as a result of the failure of faithful performance required in any contract hereunder shall be credited to the Parking Facilities Fund established in section four.

* * * (Original Section 3 stricken)

SECTION 4. There shall be set up on the books of the city a special account known as the Parking Facilities Fund. * * * (Second sentence stricken) The board may expend from the fund without appropriation for the purposes of this act; provided, that if the amount in the fund at any time exceeds the total amount of indebtedness incurred

under this act and then outstanding, together with interest thereon, so much of the excess as the board, with the approval of the planning board and the traffic commission, shall determine is no longer required for the purposes of this act, may be used for general municipal purposes.

SECTION 5. For the purposes of this act, the city may from time to time incur debt and issue bonds or notes to an amount into exceeding, in the aggregate, five million dollars. Debt may be incurred under this act only upon authorization by a two thirds vote of the city council, approved by the mayor in accordance with the city charter. The city treasurer when so authorized may borrow money and issue and sell at public or private sale serial bonds or notes, registered or with interest coupons attached, as the treasurer may deem best. Such bonds or notes shall bear on their face the words, City of Boston Parking Facilities Loan, Act of 1946. Each authorized issue shall constitute a seperate loan, and such loans shall be paid in not more than twenty years from their dates. Debt incurred from time to time under this act shall not be included in determining the limit of indebtedness of the city as established by law, but shall, except as herein provided, be subject to the provisions, applicable to the city, of chapter forty-four of the General Laws, exclusive of the limitation contained in the first paragraph of section seven thereof. Said city may issue temporary notes of the city payable in not more than one year from their dates, in anticipation of the issue of serial bonds or notes authorized by this section, but the time within which such serial bonds or notes shall become due and payable shall not, by reason of such temporary notes, be extended beyond the time fixed by this section. All notes issued in anticipation of the issue of such serial bonds or notes shall be paid from the proceeds thereof.

SECTION 6. The public improvements authorized in this act are herein declared to be general in their benefits and no betterments shall be assessed therefor.

SECTION 7. Property acquired or used for the purposes of this act, whether or not leased, shall be deemed to be held by the city in its governmental capacity; and the city shall not be liable for any injury, loss or damage suffered by any person or property on or about any property so acquired or used.

SECTION 8. If any provision of this act, of the application for such provision to any person or circumstances, shall be held invalid, the remainder of this act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SECTION 9. This act shall take effect upon its passage.

Approved June 7, 1946.

CHAPTER 612 OF THE ACTS OF 1948 OF THE COMMONWEALTH OF MASSACHUSETTS

ACTS 1948—CHAPER 612

AN ACT TO PROVIDE FURTHER FOR THE ESTABLISHMENT OF OFF-STREET PARKING FACILITIES IN THE CITY OF BOSTON.

Be it enacted, etc., as follows:

SECTION 1. It is hereby declared that the parking of motor vehicles in the streets of the city of Boston is causing at the present time such congestion in said streets as to constitute a public nuisance; that since the enactment of chapter four hundred and seventy-four of the acts of

nineteen hundred and forty-six, it has become evident that the establishment of public off-street parking facilities within the limit of indebtedness set in said chapter four hundred and seventy-four will not adequately abate the aforesaid public nuisance; that the building of structures on public off-street parking facilities which will increase the number of motor vehicles they can accommodate is necessary to further abate said nuisance; that it is not in the public interest to expend public funds in the building of structures on public off-street parking facilities when private capital is available therefor; and that the enactment of section two of this act is hereby declared to be a public necessity.

SECTION 2. Section 1 of chapter 474 of the acts of 1946 is hereby amended by striking out clause (*e*) and inserting in place thereof the following clause:—

(*e*) The power to lease to any person any property acquired or used for the purposes of this act, to be used by the lessee for the parking of motor vehicles but for no other purpose, for such period, not exceeding forty years, and upon such terms as the board shall determine; provided, however, that every lease shall contain schedules of maximum rates to be charged by the lessee for the use by the public of the property thereby demised, and also regulations with respect to the use, operation and occupancy of such property; provided, also, that no lease shall be modified or cancelled, but nothing herein shall be construed to prevent the termination of any lease by the lessor, in accordance with its provisions, for the breach of any covenant or condition thereof; and provided, further, that any lease for a period exceeding three years shall be upon the express condition, and shall contain a covenant on the part of the lessee, that within such period, not exceeding three years, after its execution as the board shall fix the lessee shall con-

struct, or cause to be constructed, upon the demised premises at the expense of the lessee and without cost to the city such structures and facilities for parking as the board shall determine, which shall at least double the number of motor vehicles the demised premises can accommodate, shall be constructed according to plans and specifications prepared under the supervision of the board, shall forthwith upon construction become the property of the city, and shall, while the lease is in force, be kept in good order and condition by the lessee; and any such lease for a period exceeding three years shall provide for the immediate reimbursement of the city for the cost of the plans and specifications and shall further provide for the payment of such annual rental as the board shall determine to be reasonable but in no event less than four per cent of the total cost to the city, as ascertained by the board, of the demised premises including any improvement thereof made prior to the execution of the lease.

SECTION 3. Section 2 of said chapter 474 is hereby amended by striking out the first sentence.

SECTION 4. Said chapter 474 is hereby further amended by striking out section 3 and inserting in place thereof the following section:— *Section 3.* Before leasing any land under this act, the board shall invite proposals therefor, by advertisements in at least one daily newspaper published in the city, once a week for at least two consecutive weeks, the last publication to be at least seven days before the time specified for the opening of said proposals. Such advertisements shall state the time and place where the form of lease and, if the term of the lease is to exceed three years, the plans and specifications, may be had and the time and place for opening the proposals in answer to said advertisements, and shall reserve to the board the right to

reject all proposals. All such proposals shall be open in public. No lease shall be made except to the highest responsible bidder as determined by the board. Every lease for a period not exceeding three years shall be accompanied by a bond with surety satisfactory to the board, or by a deposit of money, certified check or other security for the faithful performance thereof, and such bond or other security shall be deposited with the city treasurer until the lease has been carried out in all respects. Every lease for a period exceeding three years shall be accompanied by a bond with surety satisfactory to the board, or by a deposit of money, certified check or other security for the faithful performance of all covenants on the part of the lessee to construct, or cause to be constructed, any structures or facilities for parking; and such bond or other security shall be deposited with the city treasurer until all such covenants have been carried out in all respects. All amounts received in reimbursement for the cost of plans and specifications and all amounts received as a result of the failure of faithful performance of convenants to construct, or cause to be constructed, structures or facilities for parking shall be credited to the Parking Facilities Fund established under section four; and all other amounts received from leases under this act or as a result of other failure of faithful performance required in any such lease shall be credited as general funds of the city and may be appropriated for any municipal purposes. No person shall be assessed any tax upon any real estate or buildings of which he is the lessee under this act, any provision of general or special law to the contrary notwithstanding.

Section 5. Said chapter 474 is hereby further amended by inserting after section 3 the following new section:— *Section 3A.* Every proposal under section three shall be accompanied by cash or a certified check on, or a certificate

of deposit issued by, a responsible bank or trust company, payable to the city in such amount as the board may fix, which shall be stated in the invitation for proposals. The board may, at its option, prescribe and receive a bid bond in a form satisfactory to it in lieu of cash, certified check or certificate of deposit. All such bid deposits, except those of the three highest responsible and eligible bidders, shall be returned within five days, Saturdays, Sundays and holidays excluded, after the opening of proposals therefor. All bid deposits shall be returned upon the execution and delivery of the lease, or, if no lease is made, then at the expiration of ninety days after the opening of the bids therefor. Should any bidder to whom an award is made fail to enter into a lease within such time as the board may fix, the amount so received from such bidder through his cash, certified check, bid bond or certificate of deposit shall become and be the property of the city as liquidated damages; provided, that, in case of death, disability or other unforeseen circumstances affecting the bidder, such cash, certified check, bid bond or certificate of deposit may be returned to him. Any amount so received shall be credited to the Parking Facilities Fund established under section four.

SECTION 6. Section 4 of said chapter 474 is hereby amended by striking out the second sentence and inserting in place thereof the following sentence:—Into this account shall be paid the amounts specified in this act.

SECTION 7. This act shall take effect upon its passage.

Approved June 15, 1948.